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June 27, 2003

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Via Courier and Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
236 Massachusetts Avenue, N.E.
Suite 110
Washington, DC 20002

Ex Parte Presentation

Re: SAT-STA-20030611-00114; DIRECTV, Inc.; Request for Special
Temporary Authority to Move the DIRECTV 6 and DIRECTV 1 Direct
Broadcast Satellites, June 11, 2003;
and

Petition for Administrative Sanctions of the State of Hawaii (MB Docket No. 03-
82, IB Docket No. 98-21).

Dear Ms. Dortch:

On behalf of our client, the National Rural Telecommunications Cooperative (NRTC), please be advised that the undersigned met today with the following Commission officials to discuss the above-captioned proceedings:

- Barry Ohlson
Legal Advisor for Commissioner Adelstein
Spectrum and International Issues; and
Johanna Mikes
Advisor for Commissioner Adelstein
Media Issues
- Rosalee Chiara
Media Bureau;
William D. Freedman
Deputy Chief, Enforcement Bureau
Investigations & Hearings Division; and
Dana Leavitt
Enforcement Bureau

Counsel for DIRECTV, James H. Barker, was in attendance at both meetings.

NRTC's purpose during the meetings was to explain how DIRECTV has been "gaming" the Commission for more than 3 years by manipulating its satellites and service offerings to Hawaii in furtherance of its private litigation agenda against NRTC. We explained that since 1999, DIRECTV has been fully capable of providing core programming to Hawaii via

Ms. Marlene H. Dortch
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DIRECTV 1R, yet has chosen not to do so for purposes of advancing its litigation against NRTC -- without seeking a waiver from the Commission of the Geographic Service requirements.

We distributed copies of and discussed the attached Power Point slides. Based on DIRECTV's own submissions, we pointed out that DIRECTV has not been candid in its dealings with the Commission regarding its lack of service to Hawaii. For more than three years, DIRECTV ignored claims that it was limiting service to Hawaii as part of its litigation strategy against NRTC and insisted that undefined technical problems prevented it from providing core programming to Hawaii.

We distributed copies of and discussed the attached excerpts from DIRECTV's Opposition to Hawaii's Petition (Opposition), dated April 24, 2003. In the Opposition, DIRECTV finally explains that its decision not to use DIRECTV 1R to serve Hawaii with core programming has been based on its private litigation agenda against NRTC (not on any technical or public interest reasons).

We also distributed and discussed the attached chart entitled "DIRECTV Satellite Fleet" that depicts DIRECTV's various satellites in the context of the Commission's Geographic Service requirements. We noted that NRTC did not formally oppose DIRECTV's STA, since the Commission grants wide latitude to DBS licensees using STAs to manage their fleets. We pointed out, however, that the proposed satellite relocations have little to do with legitimate fleet management.

After more than three years of denying core programming to Hawaii, DIRECTV now argues that the "primary purpose" of its pending Special Temporary Authority (STA) to relocate DIRECTV 1 and DIRECTV 6 to 101° WL and 110° WL respectively, is to "enhance promptly" its provision of service to Hawaii (STA, p.1). We believe this statement lacks candor, because the primary purpose of the STA is to advance DIRECTV's litigation position against NRTC, not to serve Hawaii. It is impossible to accept DIRECTV's newly found interest in promptly improving service to Hawaii through the relocation of DIRECTV 1 and DIRECTV 6, since DIRECTV 1R has been fully capable of serving Hawaii with core programming since its launch in 1999.

We urged the Commission to review the STA in the context of Hawaii's pending Petition for Administrative Sanctions and to impose appropriate sanctions in light of DIRECTV's longstanding lack of candor in dealing with the Commission on the Hawaii issue.

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Your attention to this matter is appreciated. Should you have any questions or require any additional information, please feel free to contact the undersigned.

Sincerely,

/s/ Jack Richards

Jack Richards
Kevin G. Rupy

Attachments:

- NRTC's Power Point Presentation: Hawaii's Petition for Sanctions Against DIRECTV.
- Excerpts from Opposition of DIRECTV to Hawaii Petition for Administrative Sanctions.
- Chart: DIRECTV Satellite Fleet
- Certificate of Service

Hawaii's Petition for Sanctions Against DIRECTV.

JUNE 27, 2003

Background

- **NRTC** is a non-profit cooperative comprised of more than 1,000 rural utilities and affiliates located in 48 states.
- **April 10, 1992.** NRTC enters into a DBS Distribution Agreement with DIRECTV's predecessor in interest.
 - NRTC's members and affiliates (including Pegasus) currently distribute DIRECTV programming to approximately 1.6 million rural consumers.

NRTC vs. DIRECTV



- **June 3, 1999.** NRTC files a lawsuit against DIRECTV in the United States District Court for the Central District of California.
- **In October of 1999.** DIRECTV 1R is launched into 101° WL.
 - Unlike DIRECTV's other satellites at 101° WL, DIRECTV 1R is capable of serving Hawaii. (See Chart "DIRECTV Satellite Fleet").
 - The FCC's Geographic Service Rules require DIRECTV to provide DBS service to Hawaii "where such service is technically feasible from the authorized orbital location." 47 C.F.R. §25.148(c).
 - Despite §25.148(c), DIRECTV keeps core programming on DIRECTV 2 (which does not serve Hawaii) and refuses to move it to DIRECTV 1R (which does serve Hawaii).

DIRECTV 1R and Hawaii



- For more than three years, DIRECTV has refused to use DIRECTV 1R to provide a full complement of core programming services to Hawaii, including:
 - A&E, Cartoon Network, Country Music Television, Discovery, Disney, Encore Basic, ESPN, Family Channel, Headline News, The Nashville Network, TNT, Turner Classic Movies, USA, The Weather Channel, WTBS
- and others on the list of 22 specific programming services provided to NRTC.

DIRECTV's Excuses

- **1999 – 2003.** DIRECTV tells the FCC that technical problems prevent it from providing these programming services to Hawaii. (On only one occasion three years ago did DIRECTV allude to “litigation issues” with NRTC.)
- **February 6, 2003.** Hawaii files a *Petition for Administrative Sanctions* against DIRECTV.
- **April 24, 2003.** After three years, DIRECTV concedes that it has not been serving Hawaii with these programming services because it may harm DIRECTV's litigation position against NRTC.

The Real Reason DIRECTV Has Not Served Hawaii



According to DIRECTV:

- “If DIRECTV moves any of [the 22 programming services provided to NRTC] to the newer generation satellite DIRECTV 1R, as suggested in the Hawaii Petition, DIRECTV exposes itself to unwarranted claims that it has changed the satellite that measures the NRTC contract term from an older generation satellite to DIRECTV 1R. Such a claim, if successful, would have a severe economic impact on DIRECTV by extending the NRTC contract term beyond the expected end of fuel life of DIRECTV 1...”

Opposition to Hawaii Petition for Sanctions, MB Docket No. 03-82, pp. 13-14 (April 24, 2003), *emph. added*.

NRTC vs. DIRECTV

- **May 22, 2003.** The court in the NRTC litigation rejects DIRECTV's Motion for Summary Judgment that DIRECTV 1 at 110° WL is the satellite by which the term of the DBS Agreement should be measured.
- **June 11, 2003.** DIRECTV files its STA to move DIRECTV 1 from 110° WL to 101° WL and DIRECTV-6 from 119° WL to 101° WL.

The Reason For The STA

Myth

- DIRECTV claims that “the primary purpose of the requested STA is to enhance promptly DIRECTV’s DBS service to Hawaii.” (STA, p.1).

Reality

- DIRECTV 1R has been capable of providing a full complement of programming to Hawaii since 1999.
- The STA is the latest in a three year effort by DIRECTV to advance its litigation agenda against NRTC by manipulating its satellites and service offerings to Hawaii.

CONCLUSION

- For more than three years, DIRECTV has short-changed Hawaii and misrepresented its intentions to the FCC, in an attempt to advance its private litigation position against NRTC.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

| | | |
|--|---|---------------------|
| In the Matter of |) | |
| |) | |
| Petitions Regarding DIRECTV's DBS |) | MB Docket No. 03-82 |
| Service to the States of Alaska and Hawaii |) | IB Docket No. 98-21 |

OPPOSITION OF DIRECTV, INC.

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Counsel for DIRECTV, Inc.

Dated: April 24, 2003

Hawaii. Hawaii has proffered no evidence to contradict DIRECTV's track record of steadily improving service to the islands, or any basis to doubt that DIRECTV will pursue such proposals. Indeed, the Commission has reiterated recently its desire to "avoid dictating system design or business plans" to DBS providers,²⁴ and there is absolutely no ground to do so here with respect to Hawaii service.

Nor is it in the public interest to have Hawaii micromanage DBS programming decisions when Hawaii is neither familiar with nor subject to any of the significant technical or economic risks confronted by DIRECTV. For example, the Hawaii Petition states that DIRECTV could "include all of the ten most popular cable programming channels . . . [by moving this programming] from its older satellites at 101° W.L. to its new satellites at the same location."²⁵ DIRECTV does not dispute that it has the technical capability of moving certain programming channels from DIRECTV 2 to DIRECTV 1R, but, unfortunately, this partial solution to enhancing Hawaii service is not economically feasible at this time. The programming on the DIRECTV 1R satellite is currently the subject of imminent litigation with the National Rural Telecommunications Cooperative ("NRTC"). When the NRTC litigation is resolved, DIRECTV will have the ability to consider this option, and indeed, if the litigation is resolved in DIRECTV's favor, DIRECTV *hereby commits to pursue adjusting its lineup so as to make even more programming available to Hawaiian subscribers.*

Specifically, NRTC distributes certain DIRECTV DBS services through its members and affiliates in designated geographic areas. Under the terms of the NRTC contract, these

²⁴ *DBS Rules Order* at ¶ 65.

²⁵ Hawaii Petition at 12.

distribution rights are tied to the fuel life of the DIRECTV 1 satellite,²⁶ but DIRECTV 1 suffered a failure of its primary spacecraft control processor on July 4, 1998. DIRECTV has since relocated this satellite to operate at the 110° W.L. orbital location, so that the delivery of a significant portion of programming viewed by the largest number of subscribers would not be on a satellite operating only on its back-up control processor. NRTC apparently viewed the reassignment of DIRECTV 1 as an opportunity to extend the term of its distribution rights. NRTC has since disavowed the contractual link to DIRECTV 1 and instead has offered shifting and inconsistent positions in its litigation with DIRECTV regarding which "satellite" it contends should now measure the term of its contract.

One of the many positions NRTC has taken in the litigation is that whichever satellite transmits twenty-two defined "Programming Services" is the satellite by which the NRTC contract term is measured.²⁷ Currently, the Programming Services are transmitted on DIRECTV 2, a satellite of the same generation as DIRECTV 1, launched in 1994 with an estimated fuel life that is within approximately two years of the range of the estimated fuel life for DIRECTV 1. If DIRECTV moves any of these twenty-two services to the newer generation satellite DIRECTV 1R, as suggested in the Hawaii Petition, DIRECTV exposes itself to unwarranted claims that it has changed the satellite that measures the NRTC contract term from an older generation satellite to DIRECTV 1R. Such a claim, if successful, would have a severe economic impact on DIRECTV by extending the NRTC contract term beyond the expected end of fuel life of

²⁶ DIRECTV 1 is the initial satellite on which DIRECTV's DBS service (and the NRTC contract) commenced.

²⁷ These services are: A&E, Cartoon Network, CNBC, CNN, Country Music Television, Discovery, Disney, Encore Basic, ESPN, Family Channel, Headline News, The Nashville Network, TNT, Turner Classic Movies, USA, Weather Channel, WTBS, PBS Affiliate, ABC Affiliate, CBS Affiliate, Fox Affiliate and NBC Affiliate.

DIRECTV 1 in approximately 2009 to the end of fuel life of DIRECTV 1R, which may continue through 2024.

In light of this litigation, moving any of the twenty-two “Programming Services” onto DIRECTV 1R at this time would create risk for DIRECTV in the current NRTC litigation, which could in turn subject DIRECTV to substantial economic exposure. Any action DIRECTV takes with respect to the twenty-two Programming Services would necessarily expose DIRECTV to new threats and accusations by NRTC and would alter the facts now subject to dispute in the litigation. Beyond the economic risk associated with moving the Programming Services to DIRECTV 1R prior to resolution of the NRTC litigation, the very act of doing so would likely delay resolution of the dispute, extending the costs and uncertainty associated with prolonged participation in the litigation.

The NRTC litigation is set for trial on June 3, 2003, and its conclusion should result in a declaratory judgment regarding which satellite measures the term of the NRTC contract. When there is a final resolution, DIRECTV will have more flexibility regarding the placement of programming on its various satellites without the constraints (and economic exposure) of litigation.

Therefore, Hawaii is incorrect when it claims that DIRECTV’s claims of formidable technical and economic challenges are “completely unfounded.”²⁸ These technical and economic challenges exist, but DIRECTV is working diligently to overcome them. Indeed, subject to the outcome of the NRTC litigation, Hawaiian subscribers *could in the near term acquire up to*

²⁸ Hawaii Petition at 12.

*twenty-two additional programming services in their service packages*²⁹ – and DIRECTV will make every effort to prevail in the NRTC litigation and to provide for this result. In the longer term, there is no question that service to Hawaiian subscribers will improve as DIRECTV replaces its CONUS satellites, and/or acquires additional capacity that can be used for Hawaii service. Hawaii thus should be applauding – rather than disparaging – DIRECTV’s efforts on this score.

IV. LONG-STANDING COMMISSION PRECEDENT DEMONSTRATES THAT DIRECTV IS IN COMPLIANCE WITH THE COMMISSION’S GEOGRAPHIC SERVICE RULES

A. The Commission Has Consistently Found Nearly Identical Claims by Hawaii to Be Without Merit

Despite DIRECTV’s efforts to provide quality DBS service to Hawaii residents, Hawaii has voiced at every opportunity its dissatisfaction that DIRECTV’s service to Hawaii is not *identical* to the service DIRECTV offers to the mainland. Each time Hawaii has brought its allegations to the Commission, however, the Commission has held in DIRECTV’s favor.

The Commission first dealt with Hawaii’s allegations in a November 2000 order granting DIRECTV authority to launch and operate DIRECTV 5.³⁰ In the *DIRECTV 5 Order*, in response to Hawaii’s allegations, the Commission found that DIRECTV had made great strides in bringing service to Hawaii, stating, “[W]e note that DIRECTV has initiated service to Hawaii. Although Hawaiian subscribers will not be offered the same programming package as CONUS

²⁹ DIRECTV notes that these twenty-two additional services include much of the programming that Hawaii complains is currently lacking in DIRECTV’s Hawaii service packages. See Hawaii Petition at 6-7.

³⁰ *DIRECTV Enterprises, Inc. (For Authority to Launch and Operate a Direct Broadcast Satellite Service Space Station)*, 15 FCC Rcd 23630 (2000) (“*DIRECTV 5 Order*”).

DIRECTV Satellite Fleet

| Launch Date | Orbital Location | | |
|--|-------------------------------|------------------------------|-------------------------------|
| | <u>101° WL</u> (32 Freqs.) | <u>110° WL</u> (3 Freqs.) | <u>119° WL</u> (11 Freqs.) |
| December 17, 1993 | ————→ | DTV-1 (12/31/99) | |
| August 8, 1994 | DTV-2 | | |
| June 1995 | DTV-3 | | |
| GEOGRAPHIC SERVICE RULES 47 C.F.R. § 25.148(c) (January 19, 1996) | | | |
| March 8, 1997 | | | DTV-6 |
| October 10, 1999 | DTV-1R | | |
| November 27, 2001 | DTV-4S | | |
| May 7, 2002 | | | DTV-5 |
| June 11, 2003 (STA) | | ←———— | DTV-6 |
| June 11, 2003 (STA) | ←———— | DTV-1 | |
| December 2003(?) | | | DTV-7S |

Certificate of Service

I HEREBY CERTIFY that on this 27th day of June, 2003, a true and correct copy of the foregoing ex parte presentation of the National Rural Telecommunications Cooperative, was submitted via courier and electronic filing to the Federal Communications Commission, and served via electronic mail upon the following:

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